Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)))	CC Docket No. 95-185
Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers	)))	

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REPLY COMMENTS OF AT&T CORP.

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REPLY COMMENTS OF AT&T CORP.

AT&T Corp. ("AT&T") hereby submits its reply comments on the Notice of Proposed Rulemaking in the above-captioned proceeding.[1/]

I. INTRODUCTION AND SUMMARY

The Commission commenced this proceeding with the recognition that some long-standing deficiencies mar the relationship between local exchange carriers ("LECs") and providers of commercial mobile radio services ("CMRS"). The proposals the agency set forth were designed to address these problems by ensuring that CMRS providers are able to receive interconnection on nondiscriminatory terms based on the principle of mutual compensation.

In response, the LECs argue vociferously that no FCC action is necessary. They claim that they have been complying with Commission mandates regarding mutual compensation or, alternatively, that they have no obligation to comply. In addition, they suggest that despite the wireless industry's unanimous support for the FCC's proposals,

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[1/] Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers, Notice of Proposed Rulemaking, CC Docket No. 95-185, FCC No. 95-505 (released Jan. 11, 1996) ("Notice").

CMRS providers also are satisfied with the current state of affairs. Finally, the LECs contend that the Commission has no legal authority to set the rates for LEC-to-CMRS interconnection and that it is required to abandon all jurisdiction to the states.

This LEC outcry is understandable given the comfortable living they enjoy in the current circumstances. Indeed, in its rawest form, the LECs' principle argument against reforming their relationship with CMRS providers is a bald assertion that overcharging CMRS has historically provided a steady stream of subsidies for their regulated enterprises. Their arguments are not, however, consistent with the public interest, the law, or sound economics. Interconnection between two networks benefits the subscribers of both networks. Yet, more than a decade after the first LEC-to-CMRS interconnection deal was struck, LECs continue to charge wireless providers above-cost rates for terminating CMRS-originated calls, while paying nothing for traffic heading in the other direction. This is not mutual compensation, it is not fair, and it should no longer be tolerated by the agency charged with regulating both industries.

It is clear that the Commission is legally authorized to mandate changes in the LEC-to-CMRS interconnection relationship. Contrary to LEC claims, the Telecommunications Act of 1996 does not require the Commission to step aside while the states determine the course of nationwide wireless competition. Indeed, the 1996 Act explicitly leaves intact the Commission's existing jurisdiction over LEC-to-CMRS interconnection. That jurisdiction is based on Congress's determination in 1993 that the mobile nature of the industry requires an exclusively federal regulatory framework for CMRS. Subjecting CMRS -- including LEC-to-

CMRS interconnection -- to multiple layers of state regulation would undermine the congressional goals established in 1993.

AT&T urges the Commission to move expeditiously to establish policies that recognize that LECs derive substantial benefits from interconnection of their networks with the networks of CMRS providers. These policies should fairly compensate all carriers for the costs they incur in terminating traffic through a mutual compensation framework that requires LECs to set interconnection rates for CMRS providers at total service long-run incremental cost ("TSLRIC"). In the interim, the Commission's bill and keep proposal, if modified to include all LEC termination services, will provide an equitable and expeditious method to promote CMRS growth and to rectify continuing LEC disregard of Commission interconnection policies.

II. THE LEC COMMENTS DEMONSTRATE THE NEED FOR THE COMMISSION TO ENFORCE ITS MUTUAL COMPENSATION POLICIES

Since the inception of cellular service, CMRS providers have pursued mutual compensation arrangements, only to be rebuffed time and again by the LECs. Faced with stalwart resistance, CMRS providers have been forced to interconnect on terms dictated almost exclusively by the LECs. Not surprisingly, the LECs urge the Commission to continue relying on individual parties to arrive at mutually agreeable interconnection terms -- the so-called "good faith" negotiation process -- that has enabled LECs virtually to ignore the Commission's mutual compensation policy.

After a decade of "LEC-centric" interconnection, mutual compensation for LEC-to-CMRS interconnection is long overdue. To move toward an arrangement that would achieve the Commission's objectives for mutual compensation and create incentives for efficient interconnection, the CMRS commenters support the immediate adoption of bill and keep as an interim solution. Bill and keep, if applied to each carrier's entire termination facilities, is a suitable short-term measure that will reflect the mutual benefits of interconnection until the Commission can develop a cost-based reciprocal compensation plan.

A. While Interconnection Benefits All Carriers, Current Compensation Arrangements Benefit Only the LECs

The LECs contend that the current negotiated interconnection process between LECs and CMRS providers is working satisfactorily.[2] They argue that FCC intervention is unnecessary because CMRS providers possess ample bargaining leverage, LECs are complying with FCC policies, and wireless companies are profitable. The wireless commenters confirm, however, that the "good faith" negotiation process works poorly.[3] They point out that CMRS providers typically lack sufficient bargaining power to negotiate fair interconnection arrangements,[4] CMRS providers are forced to accept interconnection rates far above cost,[5] and mutual compensation is almost never available.[6]

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[2] See Comments of the Alaska Telephone Association at 6-7; Comments of Ameritech at 5-6; Comments of Bell Atlantic at 9; Comments of BellSouth Corporation at 16-17, 30; Comments of GTE Service Corporation at 18; Comments of U S WEST at 3.

[3] Comments of AirTouch Communications at 5; Comments of Vanguard Cellular Systems, Inc. at 3; Comments of Centennial Cellular Corp. at 8; Comments of Cox Enterprises, Inc. at 3; Joint Comments of Sprint Spectrum and American Personal Communications at 11; Comments of Century Cellunet, Inc. at 2-3.

[4] Comments of Vanguard Cellular Systems, Inc. at 3.

[5] Comments of AirTouch Communications, Inc. at 5.

[6] Comments of Vanguard Cellular Systems, Inc. at 7; Comments of 360 Communications at 3; Comments of Western Wireless Corporation at 14; Comments of Cellular Mobile Systems of St. Cloud General Partnership at 3; Comments of Bell Atlantic NYNEX Mobile at 4.

Many LECs cite the growth and profitability of cellular service as a rationale for making no changes to the current negotiated interconnection process.[7] They assert that their failure to provide mutual compensation and reasonable rates is justified because it has not seriously harmed the cellular business. The fact that LECs have not been able to put CMRS providers out of business, however, is no reason to perpetuate the current inequitable approach to interconnection. Moreover, the LEC claims fail to address how their anticompetitive behavior has affected the ability of CMRS providers to compete in the local exchange market. When CMRS providers are obligated to pay rates as much as two times the rates that LECs propose to charge other carriers for local interconnection, it can only serve to perpetuate the LEC monopoly.[8] CMRS is not now a competitor to LEC landline service, and never could be, without compensation arrangements that recognize the mutual benefits of interconnection.

[7] For example, BellSouth states that the "tremendous expansion of cellular service could not have occurred if the FCC's existing interconnection policy had been a significant impediment to the wireless industry." Comments of BellSouth Corporation at 22. See also Comments of Alaska Telephone Association at 6-7; Comments of Bell Atlantic at 9-13; Comments of GTE Service Corporation at 5; Comments of U S WEST at 3-6.

[8] Comments of Bell Atlantic NYNEX Mobile, Inc. at 5 (BANM pays 2.59 cents per minute in New York when CLECs pay only 0.98 cents per minute). Similarly, Westlink Company demonstrates that termination charges imposed on mobile traffic are significantly higher than the rates LECs charge CLECs. Comments of Westlink Company at 10. It notes that Pacific has entered agreements with CLECs that provide reciprocal termination charges of 0.75 or 0.87 cents per minute while its call termination charges for mobile calls are about 2.48 cents per minute. Id. at 11. Another cellular operator, Vanguard Cellular Systems, states that it spent more than 35 percent of its total company-wide costs for transport facilities and per-minute termination charges. Comments of Vanguard Cellular Systems, Inc. at 12.

A number of LECs point to the absence of formal complaints as "evidence" that CMRS providers are satisfied with existing interconnection arrangements.[9] In fact, the "evidence" shows that CMRS providers have fruitlessly sought mutual compensation from the LECs for many years. AT&T has asked state public service commissions countless times to ensure mutual compensation and nondiscriminatory rates for CMRS providers. In response, the states have either adopted policies that effectively preclude wireless providers from qualifying for the reasonable rates and reciprocal compensation arrangements granted to other carriers,[10] or even worse, have directly refused to grant AT&T's requests.[11]

Given the states' failure to ensure mutual compensation, AT&T has repeatedly urged the Commission to take preemptive action with regard to LEC-to-CMRS interconnection

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[9] See, e.g., Comments of U S WEST at 22; Comments of NYNEX at 13; Comments of the United States Telephone Association ("USTA") at 4.

[10] See Comments of AT&T at 26-28.

[11] See, e.g., State of Connecticut Department of Public Utility Control, DPUC Investigation into Wireless Mutual Compensation Plans, Docket No. 95-04-04, Decision, September 22, 1995; Florida Public Service Commission, Investigation Into the Rates for Interconnection of Mobile Service Providers with Facilities of Local Exchange Carriers, Docket No. 94025-TL, October 11, 1995; California Public Utilities Commission, Investigation into Regulation of Cellular Radio Telephone Utilities, Docket No. 90-06-025, Interim Opinion, June 6, 1990.

AT&T has been able to enter only one mutual compensation arrangement to date. In that case, NYNEX initiated a 2.59 cent per minute mutual compensation rate for CMRS interconnection as part of the incentive regulation plan adopted by the New York State Department of Public Service ("NYDPS"). See Proceeding On Motion Of The Commission To Investigate Performance-Based Incentive Regulatory Plans For New York Telephone Company - Track II, Order, Opinion 95-13, Case No. 92-C-0665 (Aug. 16, 1995). NYNEX has refused, however, to comply with AT&T's request to lower the rates to the same level as those offered to new landline entrants, and has recently filed an interim tariff -- with the approval of the NYDPS -- that imposes a number of cumbersome conditions on the right to mutual compensation.

rates.[12] The Commission now recognizes that its explicit oversight in this area is needed to ensure that CMRS providers are treated fairly.[13]

Remarkably, USTA asserts that LECs do, in fact, provide mutual compensation to CMRS providers. While USTA acknowledges that no cash actually leaves LEC hands, it states that "the LEC compensates the CMRS provider for terminating LEC-originated traffic through a reduction in the rate it would otherwise charge the CMRS provider for terminating CMRS-originated traffic."[14] In this regard, USTA picks an arbitrary number (4 cents per minute) and states that LECs could charge that amount, but that compensation to CMRS providers is given indirectly when the LECs lower the price to 2 cents per minute.[15]

The fact that the exorbitant and unilateral interconnection rates flowing to LECs are not even higher than they are now does not demonstrate that CMRS providers are receiving mutual compensation. USTA's self-serving argument only highlights the difficulties inherent in negotiating with an entrenched monopolist. If a LEC can arbitrarily inflate the going-in

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[12] See, e.g., Comments of McCaw Cellular Communications, Inc., Gen. Docket No. 93-252, at 33 (Nov. 8, 1993); Comments of McCaw Cellular Communications, Inc., Docket No. 94-54, at 23-25 (Sept. 12, 1994); Petition for Clarification of McCaw Cellular Communications, Inc., Gen. Docket No. 93-252 at 5-7 (May 19, 1994).

[13] LECs also argue that CMRS operators are content with current arrangements because, in the past, cellular operators supported retention of contract-based interconnection as opposed to mandated tariffing. See, e.g., Comments of U S WEST at 11. While AT&T continues to believe that contracts are preferable to tariffs, see Comments of AT&T at 17, the procedures by which interconnection is achieved have nothing to do with the fundamental problems at issue in this proceeding. Rather, these problems stem from the failure of LECs to negotiate in good faith based on the principles of mutual compensation and cost-based rates. To ensure that LECs refrain from continuing to abuse their monopoly power, it is incumbent upon the Commission to adopt its compensation proposals expeditiously.

[14] Comments of USTA at 5.

[15] Id.

price to include monopoly premiums, it can just as easily assert that it has offered a discount to accommodate the Commission's mutual compensation policy.

U S WEST, on the other hand, argues that LECs have had no obligation to pay CMRS providers for terminating LEC traffic, contending that the Commission's mutual compensation rules apply only to interstate traffic.[16/] U S WEST is wrong. The Commission has made clear that the principle of mutual compensation, whereby LECs are required to compensate CMRS providers for the costs incurred in terminating LEC-originated traffic, is an essential component of the LECs' duty to offer CMRS providers "reasonable and fair interconnection."[17/] This reasonable interconnection standard applies to all LEC-to-CMRS interconnection arrangements.

B. An Interim Bill and Keep Mechanism Appropriately Reflects the Mutual Benefits of Interconnection

To provide the opportunity for CMRS providers to enter into compensation arrangements that reflect the mutual benefits of interconnection, the Commission should adopt bill and keep as an interim mechanism. Apart from the LECs, most commenters agree that bill and keep will accomplish the Commission's mutual compensation objectives and provide incentives for efficient interconnection.[18/]

[16/] Comments of U S WEST, Inc. at 20.

[17/] See Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1497-98 (1994) ("CMRS Second Report").

[18/] See, e.g., Comments of MCI Telecommunications Corporation at 3; Comments of Omnipoint Corporation at 2; Joint Comments of Sprint Spectrum and American Personal Communications at 19; Comments of Time Warner Communications Holdings, Inc. at 6.

These commenters recognize that bill and keep has many advantages. For example, bill and keep is simple to administer and does not require the development of new billing and accounting systems.[19] Bill and keep is appropriate because CMRS providers and LECs operate networks that terminate each other's traffic, and both LEC and CMRS customers derive equal benefit from LEC-to-CMRS interconnection.[20] Bill and keep also gives LECs the incentive to develop quickly a long-term solution based on cost.[21]

The LECs' attempt to alarm the Commission that bill and keep will threaten state revenues or result in a reduction of universal service[22] is entirely without merit. First, as discussed below, there are not likely to be any significant rate increases required by implementation of a bill and keep mechanism.[23] Moreover, the concern that bill and keep would result in lost "contribution" is nothing more than an acknowledgment that LECs currently are pricing interconnection to CMRS providers above costs.[24] The fact that

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[19] Comments of MCI Telecommunications Corporation at 5.

[20] Joint Comments of Sprint Spectrum and American Personal Communications at 19.

[21] See Supplemental Declaration of Bruce M. Owen ¶ 5, attached as Exhibit A ("Owen Reply Declaration"); Comments of Time Warner Communications Holdings, Inc. at 8. There is considerable support in the record for long-term rates for interconnection based on the principles of cost-causation and mutual compensation. Comments of the NYDPS at 3, 12; Comments of the California Public Utilities Commission at 4-5; Comments of the Personal Communications Industry Association at 9; Comments of the Rural Cellular Association at 5-7; Comments of the General Services Administration at 9-10; cf. Comments of MCI Telecommunications Corporation at 8-9 (if the Commission does not adopt bill and keep, it should consider a compensation plan based on TSLRIC); Comments of AirTouch Communications at 38.

[22] Comments of the Alaska Telephone Association at 7; Comments of Ameritech at 6-7.

[23] See Section IV.B., infra.

[24] See Owen Reply Declaration ¶ 5. See also Section IV.A., infra.

LECs typically do not compensate CMRS providers at all for terminating LEC-originated calls only compounds this monopoly pricing problem, and perpetuates unfair and distorted economic results and signals.[25]

Because bill and keep, as proposed by the Commission, does not reflect the mutual benefit inherent in LEC-to-CMRS interconnection, the CMRS commenters uniformly agree that the mechanism will only be effective if the proposal extends to all LEC and CMRS termination facilities.[26] The Commission's hybrid bill and keep proposal that would permit LECs to bifurcate the compensation arrangement into two elements, one covered by bill and keep and the other by above-cost access charges, would discriminate against CMRS providers because CMRS providers would be operating only under the bill and keep portion of the arrangement. Likewise, the Commission's proposal to have CMRS providers bear 100 percent of the LEC-tariffed charges for the dedicated facilities that carry traffic between the mobile switching office and LEC tandem disregards the fact that these same trunks are also used to terminate LEC traffic on the CMRS network.

As AT&T demonstrated in its initial comments, bill and keep, when applied to each carrier's entire termination facilities, is an administratively simple interim solution without which CMRS providers will continue to subsidize LEC operations and could not begin to provide competition to the LECs.[27] Bill and keep can be adopted quickly and

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[25] Owen Reply Declaration ¶ 5.

[26] Comments of Cox Enterprises, Inc. at 32, 34; Comments of MCI Telecommunications Corporation at 5, 8; Comments of the Personal Communications Industry Association at 8; Joint Comments of Sprint Spectrum and American Personal Communications at 29; Comments of AirTouch Communications at 9, 22.

[27] Comments of AT&T at 9.

inexpensively and will reflect the mutual benefits both LECs and CMRS providers obtain through interconnection with the other's network. Because bill and keep represents an immediate solution to a decade of LEC evasion of mutual compensation, the Commission should adopt an interim bill and keep mechanism expeditiously.

III. THE COMMISSION'S ADOPTION OF INTERCONNECTION COMPENSATION POLICIES IS JUSTIFIED AS A MATTER OF LAW

The LECs and state regulators challenge the Commission's legal authority to adopt compensation arrangements for LEC-to-CMRS interconnection. They contend that the Telecommunications Act of 1996[28/] deprives the Commission of its existing jurisdiction over LEC-to-CMRS interconnection matters (other than to step in if voluntary negotiations between the parties followed by state arbitration and district court review are unsuccessful). They further argue that the federal regime established by Congress in the Budget Act of 1993[29/] has no effect on the states' authority to regulate intrastate LEC-to-CMRS interconnection. Finally, some LECs assert that bill and keep is unconstitutional because it constitutes a taking without just compensation. Acceptance of these arguments -- which are unsupported by law -- could leave the telephone companies free to continue their practice of denying CMRS providers mutual compensation and charging extraordinarily high interconnection rates.

In the 1996 Act, Congress explicitly preserved the Commission's existing jurisdiction over interconnection between LECs and other carriers pursuant to Title II. There is no

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28/ Telecommunications Act of 1996, Pub. L. No. 104-104 ("1996 Act").

29/ See 47 U.S.C. § 332.

indication that Congress intended to take the extraordinary step postulated by the LECs of reducing the FCC's role in LEC-to-CMRS interconnection matters "to essentially one of amplification and policing."[30]

Moreover, these parties ignore the fact that the 1996 Act did not amend Section 332(c), which established a federal regulatory framework for CMRS. Congress understood that wireless services operate without regard to state boundaries and that bifurcation of rate regulation would impede the development of CMRS competition. Nevertheless, the LECs and states fail to explain how the FCC can ensure compliance with its mutual compensation requirements if it only asserts jurisdiction over CMRS, and not LEC, intrastate interconnection charges.

There also is no merit to LEC arguments that an FCC-mandated bill and keep arrangement amounts to a taking without just compensation. To implicate the Fifth Amendment, agency regulation must result in rates so unjust that they are confiscatory. Under all relevant precedent, bill and keep does not produce this result.

A. The 1996 Act Does Not Alter The Commission's Authority To Adopt LEC-to-CMRS Interconnection Standards

The LECs and states would have the Commission believe that Congress has removed all authority from the agency to regulate interconnection between LECs and CMRS providers. These parties ignore the plenary nature of LEC-to-CMRS interconnection. While

[30] Ex parte Letter of Michael K. Kellogg, Counsel for Bell Atlantic Corporation and Pacific Telesis Group, to William F. Caton, Acting Secretary of the Federal Communications Commission, CC Docket No. 95-185 at 4 (March 13, 1996) ("Kellogg March 13 Paper").

the 1996 Act establishes a "new model for interconnection,"[31] the plain language of the statute makes abundantly clear that existing Commission authority over other interconnection matters remains intact: "Nothing in [Section 251] shall be construed to limit or otherwise affect the Commission's authority under Section 201."[32] As the legislative history unambiguously explains, "the provisions of new section 251 are in addition to, and in no way limit or affect, the Commission's existing authority to order interconnection under section 201 of the Communications Act."[33]

This "savings clause" applies directly to the Commission's authority over LEC-to-CMRS interconnection. Under Section 332(c)(1)(B),[34] the Commission is charged with the responsibility of ordering LECs to interconnect with CMRS providers "pursuant to section 201." Section 332(c)(1)(B) establishes LEC-to-CMRS interconnection as a federal matter subject to federal law, with Section 201 specifically designated as the means for according interconnection rights on CMRS providers.[35] As demonstrated below, this grant of authority to the Commission includes the authority over all interconnection rates.[36]

31/ See H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 121 (describing 47 U.S.C. § 251) ("1996 Act Conference Report").

32/ 47 U.S.C. § 251(i).

33/ 1996 Act Conference Report at 123 (emphasis added).

34/ 47 U.S.C. § 332(c)(1)(B).

35/ See H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 261 (1993) ("Budget Act House Report") ("The Committee considers the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network.")

36/ See Section III.B., infra.

Congress did not alter this framework in the 1996 Act;[37] to the contrary, it validated the framework for LEC-to-CMRS interconnection through the adoption of the savings clause in Section 251(i). To force LEC-to-CMRS interconnection into the structure of Sections 251 and 252, where enforcement of interconnection rights and charges is primarily the responsibility of the states, would be fundamentally inconsistent with the goal of a uniform, national policy for CMRS embodied in Section 332(c).[38]

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[37] In enacting the 1996 Act, Congress was attempting to build on its successful 1993 effort to craft a national policy for wireless services, not to supersede that policy. See To Supersede the Modification of Final Judgment Entered August 24, 1982, in the Antitrust Action Styled United States v. Western Electric Civil Action No. 82-0192, United States District Court for the District of Columbia; To Amend the Communications Act of 1934 To Regulate the Manufacturing of Bell Operating Companies, and for Other Purposes: Hearings on H.R. 3626 Before the Subcomm. on Telecommunications and Finance of the House Committee on Energy and Commerce, 103d Cong., 2d Sess. 117 (1994) (statement of Rep. Fields).

Congress's intent not to disturb its 1993 wireless policy is also revealed by the 1996 Act's presumptive exclusion of CMRS providers from the definition of "local exchange carrier" and thus from the obligations of the competitive checklist in Section 251. See 47 U.S.C. § 153(44). Given this explicit exemption from interconnection and unbundling requirements, the assertion of the California Resellers' Association that the 1996 Act somehow "validates" the California Public Utilities Commission's efforts to force CMRS providers to unbundle their networks is utterly without foundation. Cf. Comments of California Resellers' Association at 3-4, 16-17.

[38] Contrary to the LECs' characterization, the wireless industry has not attempted "to construct an intricate argument to try to slip the Commission out the back door of the 251/252 regime." Kellogg March 13 Paper at 5-6. There is nothing "intricate" about Congress's explicit instruction that the FCC's existing statutory authority covering CMRS remains intact.

Nor is there any support for the LECs' argument that Sections 251 and 252 are applicable "almost exclusively" to interconnection for the purpose of providing local telephone service. See LEC Model Interconnection Notice of Proposed Rulemaking, CC Docket No. 95-185 ¶ 78 (March 12, 1996) ("LEC Model NPRM"). The LECs' effort to limit the reach of these provisions is contradicted by the plain language of the statute. See,

(continued...)

Even if LEC-to-CMRS interconnection were governed exclusively by the 1996 Act, the Commission plainly has ample authority to adopt its proposed compensation policies, including bill and keep. Section 251(d)(1) requires the Commission to "complete all actions necessary to establish regulations to implement the requirements of [Section 251]."[39] This implementation obligation includes adoption of the pricing standards of Section 252, which is incorporated by reference into Section 251 and is an essential component of the "checklist" in that provision. To conclude that the Commission lacks authority to establish pricing standards applicable to the checklist elements is plainly inconsistent with the explicit FCC duty and authority to implement the checklist.

Nor is bill and keep only available upon agreement of the parties. Contrary to LEC arguments, Section 252(d)(2)(B)(i) does not limit bill and keep to the situation where LECs waive their right to some other form of compensation. Rather, that provision clarifies that regulators are not precluded from imposing or approving "arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including

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[38](...continued)
e.g., 47 U.S.C. § 251(b)(5) (establishing the duty of all local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of "telecommunications" -- not solely telephone exchange service); id. at § 251(c)(3) (establishing the duty of incumbent LECs to provide unbundled network elements "to any requesting telecommunications carrier for the provision of a telecommunications service") (emphasis added).

[39] 47 U.S.C. § 251(d). These requirements include "just, reasonable, and nondiscriminatory" rates for interconnection and network access and "reciprocal compensation arrangements for the transport and termination of telecommunications." See id. at § 251(c)(2)(D), (3); id. at § 251(b)(5).

arrangements that waive mutual recovery (such as bill and keep arrangements)."[40] As the legislative history indicates, this subsection was intended solely to clarify that the Act's mutual compensation mandate could be implemented by use of "a range of compensation schemes, such as an in-kind exchange of traffic without cash payment (known as bill and keep arrangements)."[41] It was not intended to supply the LECs with an avenue to avoid FCC or state determinations regarding which methodology is the most appropriate means of compensating carriers for the transport and termination of calls.

B. Section 332(c) Gives the Commission Jurisdiction Over All LEC-to-CMRS Interconnection Rates

In 1993, Congress made a dramatic alteration to the traditional federal/state split of jurisdiction over wireless telecommunications matters. While Section 2(b) generally deprives the Commission of authority over intrastate communications,[42] Congress amended that provision to exempt wireless communications services from the general limitation.[43] In so doing, Congress recognized that CMRS is different from landline service in that it operates

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[40] The FCC routinely "waives" its rules and policies, either on its own motion or in response to requests, if the public interest requires. 47 C.F.R. § 1.3; see WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972).

[41] 1996 Act Conference Report at 120.

[42] Louisiana Public Service Commission v. FCC, 476 U.S. 355, 374 (1986) ("Louisiana PSC").

[43] 47 U.S.C. § 152(b) (establishing that the Commission lacks jurisdiction over intrastate communications "[e]xcept as provided in . . . section 332") (emphasis supplied).

without regard to state boundaries.[44] Indeed, Congress expressly intended its policies to ensure the development of CMRS as a seamless, nationwide network. Therefore, it expressly removed from state purview "any authority to regulate the entry of or the rates charged by any commercial mobile service."[45]

Despite these clear pronouncements, the LECs and states urge the Commission to ignore the mandates of Section 332(c) and, for jurisdictional purposes, treat wireless interconnection matters exactly the same as interconnection between LECs and other landline carriers. They contend that Section 332 does not give the Commission express authority over the rates LECs charge CMRS providers for terminating calls and, perforce, states must retain such authority.[46] To conclude otherwise, they claim, would favor one technology

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[44] Thus, contrary to the LECs' suggestion, LEC-to-CMRS interconnection is not "local." As the courts have made clear, it is the nature of the traffic that passes through facilities rather than the location of the facilities that determines the locus of jurisdiction. See, e.g., United States v. Southwestern Cable Co., 392 U.S. 157, 168-69 (1968); National Ass'n of Regulatory Util. Comm'rs v. Federal Communications Commission, 746 F.2d 1492, 1498 (D.C. Cir. 1984); California v. Federal Communications Commission, 567 F.2d 84, 86 (D.C. Cir. 1977), cert. denied, 434 U.S. 1010 (1987). Although the interconnection facilities of LECs and CMRS providers are generally located within a single state, the difficulty of separating wireless traffic into discrete interstate and intrastate components convinced Congress to establish a federal regulatory framework for commercial mobile services, including wireless interconnection services. Regardless of the nature of any particular CMRS call, all wireless services are jurisdictionally federal.

[45] 47 U.S.C. § 332(c)(3).

[46] For example, the California Public Utilities Commission has argued that Congress's intent to give broad authority to the states is reflected in the fact that the states retain authority to regulate "terms and conditions" of service. Comments of the People of the State of California and the California Public Utilities Commission at 17. If the "terms and conditions" exception to the preemption of state regulation were read broadly enough to deprive the FCC of jurisdiction over interconnection rates, the "terms and conditions" exception would swallow the preemption rule.

over another. What these commenters fail to recognize, however, is that Congress already has made this decision: CMRS is to be treated differently.

As part of the federal regulatory scheme for CMRS, Section 332(c) gives the Commission authority to order LEC-to-CMRS interconnection pursuant to the provisions of Section 201 of the Act.[47] The Commission itself has determined that Section 2(b), as amended, and Section 332(c) establish federal jurisdiction over all CMRS rates, including the rates charged for interconnection.[48] This conclusion flows logically from the statute itself. The 1993 Budget Act amended Section 2(b) to remove the bar on federal regulation of "charges . . . in connection with intrastate communication service . . . by radio."[49] Thus, contrary to some LEC arguments, Section 332(c)'s preemption of state rate regulation is not limited to the rates CMRS providers charge end user subscribers.

Of necessity, this grant of plenary authority to the Commission over interconnection and CMRS rates carries with it jurisdiction over the rates that LECs charge wireless providers for interconnection. Congress intended a comprehensive federal framework for wireless services, which did not contemplate FCC authority over only half the LEC-CMRS equation.

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[47] See 47 U.S.C. § 332(c)(1)(B).

[48] CMRS Second Report, 9 FCC Rcd at 1499-1500, 1506-1507; Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, Notice of Proposed Rulemaking and Notice of Inquiry, CC Docket No. 94-54, FCC 94-145 at ¶ 143 (released July 1, 1994) ("Equal Access Notice") ("With respect to state jurisdiction over the intrastate rates charged by CMRS providers, the CMRS Second Report determined that the Budget Act preempts any state regulation of CMRS interconnection rates.").

[49] See 47 U.S.C. § 152(b).

Even if LECs had no reciprocal obligation to make payments to CMRS providers, state regulation of the rates LECs charge CMRS providers would undermine the federal regime established by Congress. As AT&T and a number of other CMRS providers described in their initial comments, states have been using their assumed jurisdiction over LEC-to-CMRS interconnection to deny CMRS providers reasonable, nondiscriminatory rates. These actions necessarily interfere with the congressional objectives outlined in Section 332 of "encourag[ing] competition and provid[ing] services to the largest feasible number of users."[50/]

In any event, state and federal jurisdiction over LEC-to-CMRS interconnection cannot coexist under a mutual compensation framework.[51/] As noted above, Section 332(c) preempts the states from regulating any CMRS rates, including the rates CMRS providers charge LECs for interconnection. In light of this, allowing states to regulate the rates LECs charge CMRS providers for a single integrated arrangement would undermine the Commission's ability to implement the mandates of Section 332.[52/] Fulfillment of the Commission's mutual compensation goals requires a single regulatory regime to be applied to

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[50/] See id. at § 332(a)(3).

[51/] A number of state commissions have made clear that mutual compensation and nondiscriminatory rates will not be forthcoming without compliance with state-imposed certification and tariffing requirements. States should be explicitly prohibited from conditioning CMRS providers' rights to mutual compensation and reasonable rates on the relinquishment of other federally conferred rights, such as the freedom from state entry and rate regulation. See Comments of AT&T at 28.

[52/] For example, if states were free to set LEC rates at anything above zero under a Commission-mandated bill and keep regime, the end result would not be bill and keep.

both sides of the LECs-to-CMRS equation.[53] FCC jurisdiction over the rates charged by each party is the only way to avoid inconsistent results.

In 1987, the Commission recognized that there could be a need to preempt state authority over LEC-to-CMRS interconnection and indicated that it would address such circumstances on a case-by-case basis.[54] The Commission now understands that, given the evolution of wireless services and the enactment of Section 332, the FCC can and must assert comprehensive jurisdiction over all LEC-to-CMRS interconnection rates.[55] The inseverability of LEC-to-CMRS interconnection upon which Section 332(c) is premised supports unitary jurisdiction over the rates for this service. Federal regulation of interconnection between telephone companies and CMRS providers is entirely consistent with the intent of Section 332(c).

C. Mandatory Bill and Keep Would Not Be An Unconstitutional "Taking" Without Just Compensation

The LECs argue that bill and keep is unconstitutional because it would amount to a taking without just compensation in violation of the Fifth Amendment. BellSouth, for instance, states that bill and keep would constitute a physical intrusion into the LECs'

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[53] In this respect, it is somewhat analogous to the concept to "pendent jurisdiction," which permits a federal court in a federal case involving federal and state claims that arise out of a common nucleus of facts to dispose of the state claims to avoid an inconsistent result in a state court action.

[54] Need to Promote Competition and Efficient Use of Spectrum on Radio Common Carrier Services, Declaratory Ruling, 2 FCC Rcd 2910, 2912 (1987), aff'd on recon., 4 FCC Rcd 2369 (1989).

[55] See Notice ¶ 111.

property.[56] GTE likewise contends that mandatory interconnection is a physical taking of an incumbent LEC's property because it entails carriage over a LEC's network.[57]

As a threshold matter, the LECs appear to confuse the concepts of "regulatory" and "per se" takings. To constitute a per se taking in violation of the Fifth Amendment,[58] the Commission's bill and keep policy would have to authorize "a permanent physical occupation" of LEC property.[59] Bill and keep does not do this. Moreover, GTE compounds this confusion by arguing that the Commission's authority to order physical interconnection[60] results in a per se taking. The LECs' obligation to interconnect with CMRS providers does not amount to an invasion of LEC property and, in any event, is independent of any compensation mechanism that the Commission might develop in this proceeding.

Bill and keep also does not amount to a regulatory taking. Under settled law, rate regulations do not violate the takings clause unless they are so unjust that they are confiscatory.[61] The mere fact that a rate is less than it might otherwise be is

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[56] Comments of BellSouth at 19; see also Comments of Bell Atlantic at 8.

[57] Comments of GTE at 13-14.

[58] U.S. Const. Amend. V.

[59] See Loretto v. Teleprompter Manhatten CATV Corp., 458 U.S. 419, 426 (1982) (forcing landlords to permit the installation of cable television facilities was a taking); accord Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2893 (1992).

[60] See 47 U.S.C. § 332(c)(1)(B).

[61] See Duquesne Light Co. v. Barasch, 109 S.Ct. 609, 615 (1989), citing Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578, 579 (1896) (a rate is too low if it is so "unjust as to destroy the value of the property for all purposes for which it was acquired").

irrelevant.[62] So long as the regulated rates do not jeopardize the financial integrity of a company, either by leaving it with insufficient operating capital, the inability to raise future capital, or the inability to compensate current equity holders for risk associated with their investment, courts routinely uphold agencies' rate determinations.[63] Because the LECs have not demonstrated, and cannot demonstrate, that bill and keep would precipitate any of these results, adoption of a mandatory bill and keep mechanism is constitutional.

IV. THERE IS ABUNDANT ECONOMIC JUSTIFICATION FOR COST-BASED INTERCONNECTION RATES AND BILL AND KEEP ON AN INTERIM BASIS

As AT&T demonstrated in its initial comments, cost-based rates for interconnection will provide LECs with the most economically efficient level at which to set prices and send the appropriate entry and exit signals to existing and potential competitors.[64] LEC rates set at total service, long-run incremental cost ("TSLRIC") will best approximate competitive market conditions and encourage competition. Because the LECs have delayed the offering of mutual compensation long enough, the Commission should promptly adopt bill and keep as an interim solution pending the implementation of cost-based interconnection rates for the long term.

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[62] See Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 585 (1942) (the lowest reasonable rate is one that is not confiscatory).

[63] See Duquesne, 109 S.Ct. at 618.

[64] Comments of AT&T at 16.

A. The Commission Should Require The LECs to Base Their Rates For Interconnection With CMRS Providers On Cost

In its initial comments, AT&T supported standards for LEC-to-CMRS interconnection that would require incumbent LECs to set interconnection rates for CMRS providers at TSLRIC.[65] AT&T demonstrated that although negotiations might be the most effective means for arriving at efficient rates in a competitive marketplace, the current monopoly environment requires the Commission to mandate cost-based pricing standards.[66]

Many commenters concur with AT&T that LEC rates for interconnection with CMRS providers should be based on cost.[67] These parties recognize that cost-causative pricing would be efficient,[68] establish a "level playing field" between all local service providers,[69] and generally be equitable, pro-competitive, and deter the LECs from

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[65] Id.

[66] Id.

[67] Comments of AirTouch Communications at 38; Comments of the NYDPS at 3, 12; Comments of the Personal Communications Industry Association at 10; Comments of the Rural Cellular Association at 8; Comments of the General Services Administration at 9-10; cf. Comments of MCI Telecommunications Corporation at 8-9 (if the Commission does not adopt bill and keep, it should consider a compensation plan based on TSLRIC). Unlike AT&T, most of these parties advocate setting prices at long-run incremental cost ("LRIC") rather than TSLRIC. As AT&T demonstrated in its initial comments, interconnection rates set at TSLRIC cure the deficiencies inherent in LRIC pricing by treating many joint and common costs as direct, and thereby ensuring their recovery. See Comments of AT&T at 16 n.39. In contrast to many of the LECs' pricing proposals, however, TSLRIC does not give the telephone companies almost complete freedom to allocate overheads to their monopoly services.

[68] Comments of AirTouch Communications at 10.

[69] Comments of the NYDPS at 3.